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NO. ________

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1986

WILLIE D. PHILLIPS, et al,

PETITIONERS,

v.

THE AMOCO OIL COMPANY, et al

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES

COURT OF APPEALS

FOR THE

ELEVENTH CIRCUIT

J. Gusty Yearout*

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QUESTIONS PRESENTED

I. WHETHER PETITIONERS STATED VIABLE COMMON-LAW AND ERISA CLAIMS

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The opinion of the Eleventh Circuit Court of Appeals, Phillips v. Amoco Oil Company, 799 F.2d 1464 (11th Cir. 1986), appears in the Appendix. The opinion of the district court, Phillips v. Amoco Oil Company, 619 F. Supp. 694 (N.D. Ala. 1985), also appears in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on the 22nd day of September, 1986. A timely petition for rehearing was filed on the 14th day of October, 1986, and was denied on the 28th day of October, 1986. This

Court's jurisdiction is invoked under the Employee Retirement Income Security Act of September 2, 1974, 29 U.S.C. § 1001, *et seq.*

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

The Employee Retirement Income Security Act of September 2, 1974, 29 U.S.C. § 1001, *et seq.*

STATEMENT OF THE CASE

Willie D. Phillips, Horace T. Lovell, J. P. Fennell, William H. Jones, Frank Murphree, Billy R. Pinyan, Lewis O. Moore, and Mildred Gaynell McClendon, individually and on behalf of others

similarly situated, filed suit on September 26, 1980, against Standard Oil Company and Respondents, Amoco Oil Company (hereinafter "Amoco"), Joe D. Bearden (hereinafter "Bearden"), and Northern Propane Gas Company (hereinafter "Norgas") and demanded a jury trial. (R. 1-1-10). Thereafter, H. Glenn Gardner, Homer Weaver, Owen J. Sims, Agnes Copeland, James H. Owens, Elah M. Gurley, Larry U. Davis, Walter Shaneyfelt, and R. C. Shrader joined in the complaint previously filed. (All petitioners shall hereinafter be collectively referred to as "the Employees").

The complaint contained class averments as well as six counts. Count

One alleged Amoco breached an agreement with the Employees by terminating the Employees for no just cause from their employment and by further depriving the employees of certain retirement benefits as well as other benefits. Count Two alleged Amoco, through its agents, servants, and/or employees made fraudulent misrepresentations concerning the Employees' employment with Amoco. Count Three alleged Amoco, Norgas, and Bearden occupied a fiduciary relationship with regard to the Employees and that Amoco, Norgas, and Bearden had superior knowledge regarding the Employees' length of employment, pension and retirement benefits, and the comprehensive employment benefit program

available to the Employees. This Count further that Amoco, Norgas, and Bearden suppressed material facts which they were under an obligation to communicate to the Employees, thereby practicing a fraud upon the Employees. Count Five alleged Amoco, Norgas, and Bearden were guilty of misrepresentation and willful deceit pursuant to Alabama Code §§ 6-5-101,-102,-103, and 104 (Ala. Code 1975). Count Six alleged Amoco, Norgas, and Bearden were guilty of conspiring to misrepresent and suppress material facts regarding the Employees' length of employment, employment benefits, retirement benefits, and pension benefits, thereby depriving the

Employees of their rightful employment benefits. (R. 1-1-30-39).

Amoco, Norgas, and Bearden filed a petition to remove the case to the United States District Court for the Northern District of Alabama, Southern Division, on October 27, 1980. (R. 1-1-1) The basis of this petition was that the Employees' claims were governed by the Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. (R. 1-1-18) Bearden filed a motion to dismiss, or in the alternative, a motion for a more definite statement on October 27, 1980. (R. 1-3-1). A similar motion was filed on behalf of Norgas on October 27, 1980, (R. 1-4-1), which was granted on December 4, 1981. (R. 1-12-1)

Standard Oil Company filed a motion to dismiss on October 27, 1980, on the ground that the court lacked jurisdiction over it. This motion was granted on January 7, 1981. (R. 1-2-1) A motion to remand was filed on behalf of the Employees on November 6, 1980. On December 17, 1980, the Employees supplemented their original motion to remand by attaching an affidavit of five of the Employees which stated that the individual defendant and respondent herein, Bearden, was guilty of misrepresenting the Employees' job security and benefits. The affidavit further stated that Bearden was guilty of misrepresenting to the Employees that Amoco would never sell the liquid propane

gas facility made the basis of their lawsuit and the facility at which the Employees were employed. The motion to remand was denied on January 8, 1981. (R. 1-6; R. 1-8-1)

The Employees amended their complaint on December 19, 1980, by adding Count Seven which alleged that Amoco represented to the Employees, individually and collectively, that all pension, retirement, and profit sharing benefits with Amoco would be protected, vested, and would be in full force and effect until the Employees reached retirement age. The Employees further alleged that Amoco, through its agents, and employees, represented that it would not, under any circumstances, sell the

facility at which the Employees were employed unless a sale was made which would fully protect Employee benefit rights existing under the Employees' employment with Amoco. (R. 1-9-1) The complaint was amended again on April 26, 1982, to add Counts Eight through Seventeen. Count Sixteen of the amended complaint alleged that Amoco interfered with the rights of the Employees to receive the benefits which existed under the contract of employment between the Employees and Amoco. (R. 1-14-11-17)

The Employees amended their complaint again on June 25, 1982, to add that the defendants had violated 29 U.S.C. § 1104(a)(1); 29 U.S.C. § 1104(a)(1)(B); 29 U.S.C. §

1106(b)(2); 29 U.S.C. § 1110(a); and 29 U.S.C. § 1343(a)(b). (R. 1-19-1-31) A motion to dismiss filed on behalf of Amoco on July 7, 1982, was overruled. (R. 1-20-1) A pre-trial order was entered by the court on October 24, 1984. (R. 2-28-1) On November 5, 1984, Norgas filed a motion for summary judgment. (R. 2-29-1) In support thereof, Norgas offered the depositions of the Employees, the pre-trial order, all pleadings on file, and the affidavits of Ronald Ingram and John Churchill. (R. 2-30-1 and R. 2-31-1) Amoco and Bearden filed motions for summary judgment on November 8, 1984. (R. 2-33-1) In support thereof, Amoco and Bearden offered deposition excerpts, the

affidavits of Larry J. Boyd, John Churchill, Ronald E. Ingram, C. E. Webb, and William C. Jackson. (A 222-364) On January 28, 1985, the Employees objected to the affidavits submitted in support of the motions for summary judgment by filing a motion to strike on the grounds, inter alia, that the affidavits were based on hearsay and drew conclusions which invaded the province of the jury. (R. 2-37-1) This motion to strike was overruled on June 18, 1985, and on the same date, the trial court granted summary judgment in favor of Amoco, Norgas, and Bearden. A memorandum opinion accompanied the order of judgment. (R. 2-38-1)

A motion to reconsider, or to vacate, and for recusal was filed on June 28, 1985. (R. 2-40-1) One basis of this motion was that the author of the memorandum opinion supporting the judgment entered in the case was the law clerk for the trial judge and this clerk had accepted a job with the law firm representing Norgas during the pendency of the litigation. Disclosure of this employment had not been made to counsel for the Employees. (R. 2-40-1) The motion further alleged that the court was incorrect in holding that Amoco, Norgas, and Bearden were entitled to judgment as a matter of law with respect to the ERISA claims, in holding that the fraud claims were barred by the statute of

limitations, in holding that the common law claims were preempted by ERISA, and in holding that there was no genuine issue of material fact with regard to the claims for breach of lifetime employment contracts. (R. 2-40-2-3) Norgas objected to the motion based primarily on the argument that the Employees had waived any objection to participation of the law clerk in the case. (R. 2-41-2) The law clerk himself filed an affidavit in support of the contentions of Norgas. (R. 2-42-1) The motions for reconsideration and recusal were overruled on September 9, 1985, (R. 2-40-1), with a separate memorandum opinion entered on the same date. (R. 2-43-1) Notice of appeal was timely

filed on September 27, 1985. (R. 2-44-1) The Eleventh Circuit affirmed the trial court on September 22, 1986. A timely motion for reconsideration was filed on October 14, 1986. This was overruled on Ocotber 28, 1986.

Amoco's predecessor in name, American Oil Company, merged with an entity known as Tulcma, Inc., in 1968. Five of the Employees were previously employed by companies acquired by Amoco or Tuloma and eleven of the Employees were employed by Amoco as new employees. (R. 2-28-4)

Amoco began looking for a means to dispose of its liquid propane gas facilities prior to May 4, 1979. On May 4, 1979, Norgas submitted an offer to

purchase Amoco's LPG operations in the southeastern United States contingent upon approval by the board of directors of the parent company of Norgas. By letter dated May 10, 1979, Amoco accepted the offer of Norgas. The two companies then exchanged information and negotiated a final agreement. On July 31, 1979, the final sales contract was signed. A meeting was held in Boaz, Alabama, in August 1979 ostensibly to explain the sale of the LPG facilities to the Amoco LPG Employees. The testimony of the Employees taken in this action shows the confusion present at the meeting and also substantiates the argument that the meeting did little to clarify the terms of the sale insofar as the Employees were

concerned. The sale was closed effective 12:01 September 4, 1979. Employment with Norgas was begun on September 4, 1979. After the sale of the LPG operation to Norgas, the Employees had the same job responsibilities he or she had with Amoco and were compensated at the same rate of pay. (R. 2-28-8) The Employees had been eligible to participate in the Employee Retirement Plan of Standard Oil Company and participating companies as employees of Amoco. Standard Oil Company was the administrator and named fiduciary of the Employee Retirement Plan of Standard Oil Company. Each of the Employees who was vested under the Employee Retirement Plan of Standard Oil Company is currently receiving an annuity

from the plan. The Employees' years of service with Amoco were recognized by Norgas for purposes of vacation time but years of service with Amoco for early retirement purposes were not credited by Norgas.

REASONS WHY THE WRIT SHOULD BE ISSUED

THE EMPLOYEES STATED COMMON-LAW CLAIMS THAT WERE NOT PREEMPTED BY ERISA. ADDITIONALLY, THE EMPLOYEES STATED VIABLE CLAIMS UNDER ERISA. ERISA DOES NOT PREEMPT COMMON-LAW CAUSES OF ACTION WHEN THE ADJUDICATION OF THOSE CLAIMS DOES NOT <u>REGULATE</u> A PENSION PLAN.

This Court in <u>Franchise Tax Board v. Construction Laborers'</u>

Vacations Trust for Southern California, 463 U.S. 1, 77 L.Ed. 2d 420 (1983), faced a decision as to whether ERISA permitted state tax authorities to collect unpaid state income taxes by levying on funds held in trust for taxpayers under an ERISA-covered vacation benefit plan. The procedural issue before this Court, and the only issue that was decided by this Court, was whether a federal court has jurisdiction to decide the above-stated substantive issue after the lawsuit has been removed from state court. This Court held that the case was not within the removal jurisdiction conferred by 28 U.S.C. § 1441 and, therefore, did not reach the merits of the previously mentioned question.

Franchise Tax Board, 77 L.Ed. 2d at 429. This Court did cite the legislative history of ERISA and noted that although ERISA defines who may bring actions for particular kinds of relief, ERISA does not purport to reach every question relating to potential plaintiffs covered by the statute. Further, the court noted that 29 U.S.C. § 1441(b)(2)(A) "makes clear that Congress did not intend to preempt entirely every state cause of action relating to such plans." Franchise Tax Board, 77 L.Ed. 2d at 440-41. While Alessi v. Raybestos-Manhatten, Inc., 451 U.S. 504 (1981), states that ERISA does preempt state causes of action which purport to "regulate, directly or indirectly, the

terms and conditions of employment benefit plans covered by the chapter," 451 U.S. at 525, a common-law cause of action which does not purport to directly "regulate" a pension plan should be allowed to proceed.

Allowing common-law claims such as the ones stated by the Employees in the instant case to proceed is in accord with the holdings of this Court with regard to preemption and other areas of federal law. The Court in Belknap, Inc. v. Hale, 463 U.S. 491, (1983), was faced with the issue of the scope of the preemption of the National Labor Relations Act. The Court set forth the rules that are used in deciding whether the National Labor Relation Act preempts state causes of

action. First, the Court stated that state regulations and causes of actions are presumptively preempted if they concern conduct that is arguably either prohibited or protected by the National Labor Relations Act. 463 U.S. at 498. For this proposition, the Court cited San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959). Second, state regulation of a cause of action may, nonetheless, be sustained if the behavior to be regulated is behavior of only peripheral concern to federal law or touches interests deeply rooted in local feeling and responsibility. 463 U.S. at 498. Stated differently, the state's interest in controlling or remedying the effects of the conduct is

considered in balancing the state's interest with the Labor Board's ability to adjudicate controversy committed to it by the Labor Relations Act. 463 U.S. at 498-99.

Dealing with the facts presented in the Belknap case, the Court noted that Kentucky had a substantial interest in protecting its citizens from misrepresentations that caused grievous harm. The Court held, therefore, that the National Labor Relations Act did not preempt the misrepresentation and breach of contract claims against the employer. Likewise, in the instant decision, the fraud and conspiracy causes of action as well as that of breach of contract alleged by the Employees should not be

preempted by ERISA. The state has a strong interest in discouraging such behavior so as to protect its citizens from such fraudulent conduct and breaches of contract.

While the National Labor Relations Act may not contain expressed preemption provisions, this Court has nonetheless held state regulations and causes of actions are preempted by the National Labor Relations Act if those regulations or causes of actions concern conduct that is actually or arguably either prohibited or protected by the National Labor Relations Act. 463 U.S. at 498 (citing San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959)). As noted by the court in Metropolitan

Life Insurance Company v. Massachusetts, ____ U.S. _____, 85 L.Ed. 2d, 728 (1985), the analysis used in determining whether a state law is preempted under ERISA or the National Labor Relations Act is the same since, "[t]the purpose of Congress is the ultimate touchstone." 85 L.Ed. 2d at 740 (citing Malone v. White Motor Corporation, 435 U.S. 497, 504 (1978)). The narrow issue in the Metropolitan Life case, according to the Court, was whether a Massachusetts law requiring minimum mental-health-care benefits be provided to Massachusetts residents covered under an employee health plan was a law which "regulated insurance" pursuant to 29 U.S.C. § 514(b)(2)(A). This section specifically

deals with the issue of preemption in the insurance field. Since the court in Metropolitan Life noted it was dealing with a narrow issue and addressed a statute concerning preemption with regard to the insurance field and employee benefit plans, that case should not be read so broadly as to set a precedent for preemption of every conceivable cause of action under state law that merely touches on an employee benefit plan but does not seek to regulate or control that plan.

The Seventh Circuit in Bucyrus-Erie Company v. Department of Industry, Labor, and Human Relations, 599 F.2d 205 (7th Cir. 1979), cert. denied, 444 U.S. 1031 (1980), held

Congress did not intend to preempt the enforcement of state fair employment laws. The mere fact that the plan involved in <u>Bucyrus-Erie</u> governing pregnancy leave was subject to federal regulations did not inevitably require the preemption of concurrent state legislation. The court in the <u>Bucyrus-Erie</u> case noted ERISA does not include any substantive provisions prohibiting an employer from maintaining discriminatory benefit plans. Therefore, the Seventh Circuit held there was no conflict and ultimately, no preemption. <u>Bucyrus-Erie</u>, 599 F.2d at 207. The court stated the initial question must be whether the Wisconsin fair-employee laws "related" to employee benefit plans. <u>Bucyrus-Erie</u>, 599 F.2d at 208. Using

this analysis, the Seventh Circuit held the preemption of state fair-employment laws would "alter" and probably impair the Congressional scheme for preventing employment discrimination. Bucyrus-Erie, 599 F. 2d at 210. Applying this same analysis to the case at bar reveals that holding that the Employees' common-law claims are preempted would allow employers such as Amoco to freely defraud employees by assuring them they have permanent employment while clandestinely operating to obtain the greatest monetary benefit for theemployer and concomitantly depriving the employee of an opportunity to obtain pension rights and to participate in negotiations of the sale

of a facility such as the one involved in this case.

To hold the fraud claims and breach of contract claims are preempted by ERISA would be to frustrate the very purpose of ERISA as well as other state laws which regulate the wrongful conduct set out in the Employees' complaint. Thus, the Employees respectfully contend that the state's interest in controlling or remedying the effects of the conduct complained of should be weighed against any alleged interference with the provisions of ERISA. Such a weighing clearly shows that the scales are tipped in favor of allowing the Employees to proceed with their common-law claims. To allow the Employees to proceed with their

common-law claims would not directly affect the pension plan but would deter similar conduct by employers in the future.

The Seventh Circuit in Savings and Profit Sharing Fund of Sears Employees v. Gago, 717 F.2d 1038 (7th Cir. 1983), noted there are necessary limits to the phrase "relates to" as found in 29 U.S.C. § 1144, ERISA'S preemption statute. The Gago opinion quoted from a footnote found in Shaw v. Delta Airlines, Incorporated, 463 U.S. 85 (1983), which recognized that some state action may affect employee benefit plans in too tenuous, too remote, or peripheral a manner to find that the state action is

preempted. Shaw, 463 U.S. 100 n. 21. While the interference with the attainment of benefits is part of the damage suffered by the Employees, the conduct complained of is fraud and breach of lifetime contracts of employment. Thus, the Employees respectfully contend the pension plan is only remotely affected by the pursuit of common-law claims by the Employees.

Amoco, Bearden, and Norgas have steadfastly maintained throughout these proceedings that not only are the common-law claims preempted but also that there is no cause of action for the alleged wrongful conduct under ERISA. This argument creates an escape from liability for Amoco, Norgas, and Bearden.

By arguing that state causes of action are preempted on one hand and that there are no causes of action for the conduct complained of under ERISA, Amoco, Norgas, and Bearden actually support the argument that the common-law causes of action should not be preempted by seeking a result that was never intended by Congress.

The Eleventh Circuit erroneously held the common-law claims for fraud were barred by the one year statute of limitations in Alabama for fraud. Ala. Code § 6-2-39 (1975). The Employees' claim did not accrue until September 4, 1979. The complaint was timely filed on September 4, 1980. The law in Alabama is to the effect that the

statute of limitations for torts can begin to run only when an injury happens or damage accrues. Brotherhood of Locomotive Firemen and Enginemen v. Hammett, 273 Ala. 397, 401, 140 So. 2d 832 (1962); Corona Coal Company v. Hendon, 213 Ala. 323, 325, 104 So. 799 (1925). The cause of action in this case accrued on the date the Employees were forced to leave their employment with Amoco. Prior to that date, the Employees had suffered no injury for which they could complain.

The defendant in the Hammett decision alleged, as have Amoco and Bearden, that the plainitffs' cause of action was barred by the applicable statute of limitations. In Hammett the

defendant asserted that the wrongful conduct occurred in July 1955. The complaint, however, was not filed until March 21, 1957. The critical factor in Hammett as in the instant case, was the fact the plaintiff had not been taken off the payroll of his employer until June 1, 1956. The Alabama Supreme Court held in this action for wrongful and malicious interference with the plaintiff's right to earn a living that the statute of limitations began to run only when the injury happened or damage accrued, not from the date of the act causing the injury or damage. As the plaintiff had suffered no damage until he lost his job on June 1, 1956, the plaintiff in the Hammett decision had one year from June

1, 1956 to maintain his action to recover for damage resulting from the loss of employment. The court held the defendant's contention with respect to the statute of limitations was without merit. Hammett, 273 Ala. at 41. The contention of Amoco and Bearden in the instant case with regard to the statute of limitations is equally without merit.

The fraudulent conduct caused no injury to the Employees as long as they were employed by Amoco. Once, however, the Employees were no longer employed by Amoco, they suffered an injury. The Employees no longer had the employment with Amoco which they had been told they would have until they retired. The law in Alabama is that until a plaintiff

suffers an injury he has no right to bring an action, and the statute of limitations does not begin to run until an injury occurs.

In Ramey v. Guyton, 394 So. 2d 2 (Ala. 1981), decided under Alabama's statute of limitations for medical malpractice, the plaintiff filed suit against her physician because of a stroke suffered approximately one year after the doctor prescribed birth control pills. The plaintiff first saw the defendant doctor in August 1970 and last saw him on August 27, 1975. On the last visit, the physician prescribed the suspect birth control pills, and the plaintiff took the pills as prescribed until August 5, 1976, when she suffered a stroke. The lawsuit

was filed on August 1, 1978. The trial court granted summary judgment in favor of the defendant doctor based upon the statute of limitations. This judgment, however, was reversed by the supreme court. The defendant contended that August 27, 1975, the date of the plaintiff's last visit with the doctor and the date the prescription was given was the date that the cause of action accrued. The supreme court held, however, that the cause of action accrued on the day the plaintiff suffered the stroke.

The one year statute of limitations for torts begins to run when the plaintiff suffers an injury which in turn gives rise to a cause of action. The

fraudulent acts of Amoco, Bearden, and Norgas in this case did not cause an injury contemporaneous with the fraudulent acts. The injury occurred no earlier than September 4, 1979, because on September 4, 1979, the Employees were actually deprived of what they had been promised.

Even assuming the statute did begin to run earlier than September 4, 1979, the testimony with regard to what the Employees were told at the Boaz meeting concerning the benefits that the Employees would have with Norgas is in conflict. Willie Phillips described the meeting in Boaz in August 1979 as "the wildest thing I ever got in on." (Phillips depo. at 63) Phillips went on

to say, "Didn't nobody know nothin' about nothin', I don't reckon." (Phillips depo. at 73) He further testified, "But we didn't know nothin' what we were signing." The meeting began at approximately 7:00 p.m. and ended somewhere between 12:30 and 1:00 a.m., and the plaintiffs had to go to work the next day. (Frank Murphree depo. at 52; Mildred McClendon depo. at 38)

At least one Employee testified that as a result of the Boaz meeting, she thought that Amoco was merely undergoing another name change. (E. Gurley depo. at 30) She stated she did not realize that her years of service with Amoco would not be credited toward her employment with Norgas until October 1979. (Gurley depo.

at 40) Mildred McClendon testified that she did not realize that her years of service with Amoco would not be credited by Norgas until possibly one month after the Boaz meeting. (McClendon depo. at 58) Larry Davis stated that he could not remember when he realized that his years of service with Amoco would not be carried over and applied to his employment with Norgas, but that it was after Norgas had purchased Amoco's LPG facilities. (L. Davis depo. at 42) James Owens testified he realized his years of service with Amoco would not be credited by Norgas <u>after</u> he went to work for Norgas. (J. Owens depo. at 57)

Billy Ray Pinyan stated, "There was just so many papers until you didn't have

time to really read to see what you were signing." (B. Pinyan depo. at 53) Lewis O. Moore testified that he thought the purpose of the Boaz meeting was to announce another name change. The first time he learned that his years of service would not be credited by Norgas was when he received his paycheck from Norgas. (L. Moore depo. at 38) He also testified he had a conversation with Ray Coile, an agent or employee of Amoco, in July or August 1979 at which time Mr. Coile stated that Mr. Moore would not lose any time with regard to his benefits. (L. Moore depo. at 62) It was Mr. Moore's understanding that his years of service with Amoco would be credited under the

Norgas retirement plan. (L. Moore depo. at 82)

Willie Phillips testified that Bearden told him everything would be the same after Amoco sold its LPG facilities to Norgas. (W. Phillips depo. at 64-65) Robert Shrader testified that he was told at the Boaz meeting that he would be "better off with Norgas than [he was] with Amoco and that the persons in charge of the Boaz meeting told the Amoco employees that, "Northern Propane was going to be our new owners. And that they . . ., I thought, were going to give us the same or better than what we had. That is, . . . I was under the impression . . . they were telling us that we were going to be better off with Northern than

we were with Amoco." (R. Shrader depo. at 48) Owen Sims describes the Boaz meeting as "so much [taking] place so fast that night we don't really know what all took place." James Owens testified that the benefits were not explained at the Boaz meeting. (J. Owens depo. at 57)

A letter from Norgas, Exhibit 0764 to the deposition of Appellant Horace T. Lovell, stated "Norgas has a comprehensive set of benefit programs quite comparable to the benefits you currently receive from Amoco." Owen Sims testified that he was told by higher-level employees of Amoco that Norgas was taking over all benefits Amoco had provided for its employees. (O. Sims depo. at 56) The above excerpts from the

depositions and this letter show there is a conflict in what was and what was not said at the Boaz meeting and in other conversations between the Amoco supervisors and the Employees. In light of this testimony, a fact question was created with regard to whether the Employees knew as of the Boaz meeting that they had been defrauded.

Amoco, Bearden, and Norgas argued before the trial court that the savings clause of § 6-2-3 (Ala. Code 1975) is applicable to the instant case. Employees contend that this savings clause is inapplicable as suit was filed within the one year period after Employees suffered injury. Even assuming § 6-2-3 is applicable, a conflict in

the evidence as to when the plaintiffs discovered the fraud created a material fact which precluded the entry of summary judgment. In <u>Wilson v. Draper</u>, 406 So. 2d 429 (Ala. Civ. App. 1981), the vendor of a piece of property brought suit based upon fraud against the purchaser of the property. The vendor, an illiterate man, had inherited sixty acres of property from his grandfather. In 1975 he sold the property to the defendant for $22,000.00. Evidence was introduced that the vendor had received a promissory note for only $11,800.00 in the spring of 1978. The plaintiff discovered at that time the defendant was only paying him $11,800.00 for the property instead of the agreed upon price

of $22,000.00. The defendant raised the statute of limitations as the defense, but in order to show that he was within the savings period of the statute of limitations, the plaintiff presented evidence that he did not know that the sales price differed from the amount he agreed upon until May 1978. The court stated, "This testimony, while it does not clearly establish when the plaintiff first discovered the fraud, does indicate that the plaintiff was unaware of the fraud until the passage of considerable time after the deed was signed." 406 So. 2d at 431.

The Alabama Supreme Court in Weninegar v. S. S. Steele & Company, Inc., 477 So. 2d 949 (Ala.

1985), adopted the ruling of the Supreme Court of Alaska in Austin v. Fulton Insurance Company, 444 P. 2d 536 (Alaska 1968), in which the court stated as follows: "A tort is ordinarily not complete until there has been an invasion of a legally protected interest of the plaintiff. . . . [T]here must be an injury or harm to [plaintiff] as a consequence of [defendants'] negligence to serve as a basis for recovery of damages before the tort [becomes] actionable and before the period of limitation [commences] to run." 477 So. 2d at 956 (quoting Austin, 444 P. 2d at 539). The Alabama court stated that it believed this to be the proper rule and overruled an earlier decision,

Moore v. United States Pipe & Foundry Company, 384 So. 2d 1108 (Ala. Civ. App. 1980), to the extent that it conflicted with its holding.

Both the Weninegar and Hammett decisions support the position of the Employees herein that the statute of limitations for their claims of fraud did not begin until their employment with Amoco was terminated on September 4, 1979, at which time the Employees had suffered the injury or harm necessary to form a basis for recovery of damages. Prior to September 4, 1979, the Employees had suffered no damages for which a complaint could have been filed. The Employees did state causes of action under ERISA necessary to withstand the

motions for summary judgment. The Employees allege that Amoco, Norgas, and Bearden were guilty of violation of 29 U.S.C. § 1140. Section 1140 provides a comprehensive prohibition forbidding discrimination against plaintiff participants or beneficiaries for the purpose of interfering with the attainment of any right to which the participant may become entitled under the plan. The Employees asserted Amoco and Norgas were guilty of discriminating against them for the purpose of interfering with their attainment of rights under the plan. The trial court interpreted the Employees' position with regard to § 1140 as being that § 1140 was intended to prohibit the sale of

businesses. (R. 2-38-45) This was not, and is not, the position of the Employees. Rather, the Employees have alleged that Amoco deliberately followed a plan for avoiding pension liability as a means of increasing profits, not that it deliberately increased its profits by means that happened to affect the Employees' eligibility for pension benefits.

The plaintiff in Calhoun v. Falstaff Brewing Corporation, 478 F. Supp. 357 (E.D. Mo. 1979), alleged the defendants had discharged the plaintiff from employment after more than nine years of satisfactory service for no reason other than to prevent him from attaining vested rights due him under the

pension plan provided by the defendants. The court held that summary judgment in favor of the defendants was improper in this situation as this conduct was the type conduct intended to be prohibited by § 1140. In fact, the court noted that practices of this sort may have been one of the prime targets of ERISA. 478 F. Supp. at 359-60. The court also noted that whether the plaintiff's rights under the plan were vested within the meaning of ERISA at the time of his discharge would be irrelevant to a cause of action based on § 1140. 478 F. Supp. at 360.

The Employees alleged in the instant complaint that Amoco followed a plan for avoiding pension liability as a means of increasing its profitability. Deposition

testimony revealed that keeping the Employees "in place," until the sale of the LPG facilities had been completed,made the sale more profitable to Amoco. Further testimony indicated Amoco took into consideration the monies that had to be expended to fund the plan in making the decision to divest itself of the LPG facilities. The sale was more lucrative to Norgas as well because Norgas received the benefit of experienced route salesmen with well-established contracts. (G. Richmond depo. at 49-51) At the same time, Norgas was able to avoid the financial obligations of crediting past years of service of the Employees with Amoco for vesting purposes.

The language of § 1140 is extremely broad as it prohibits discrimination against a participant for the purpose of interference with the attainment of _any_ right to which the participant _may become entitled_. The Second Circuit has stated that "ERISA is thus a remedial statute, the coverage of which should be liberally construed, and exemptions from which should be confined to a narrow purpose." _Rose v. Long Island R. R. Pension Plan_, 690 F.2d 49, 54 (2nd Cir. 1982).

The district court in _Kross v. Western Electric Company, Inc._, 701 F. 2d 1238 (7th Cir. 1983), granted summary judgment in favor of the defendant employer in an ERISA case in which the plaintiff had alleged the defendant had

discharged the plaintiff to prevent him from continuing to participate in a company-provided insurance plan. The Seventh Circuit reversed the district court's order and held that since ERISA is a remedial statute it is to be liberally construed in favor of the employee benefit fund participants. The court further noted that the plaintiff's allegations stated a claim under § 1140 since such allegations, if proven, might establish that the plaintiff employee was discharged for the purpose of interfering with the attainment of a right under the insurance plans provided by the employer. Kross, 701 F.2d at 1242-43.

Section 1140 creates a federal cause of action against what might be described

as "pension discrimination," or action that is deliberately designed to prevent participants or beneficiaries from ever attaining eligibility for pension or welfare plan benefits to which they otherwise might become entitled. The guarantee of § 1140 is crucial to the entire framework of ERISA. Without it, parties would be free to nullify other ERISA guarantees by operating in such a manner that an individual beneficiary never attains eligibility for benefits under an otherwise lawful plan. Section 1140 affords the individual this protection independent of any rights covered under a benefit plan or agreement. Once an employer undertakes to provide a

benefit plan, then he must adhere to these standards.

The mandate of § 1140 is absolute: an employer shall not discriminate in such a manner as to interfere with the attainment of plan rights. The statute does not allow employers to discriminate when doing so would spare the employer the obligation of providing full pension benefits. The statute does not provide that employers who face hostile markets may take such self-help measures as terminating employees to prevent their gaining eligibility for pension benefits. The statute does not permit a "business necessity" defense for avoiding pension liability. An employer always benefits financially by terminating an employee

prior to the approval of his pension rights. If the benefit plan has been fully funded, the employer reaps the benefits of the funds accumulated which, due to the interference with the attainment of pension rights, are no longer needed to provide the benefits. If the employer has not funded a plan, then the employer avoids the liability he would have incurred had he not manipulated the employee's service and prevented accrual. In any event, discrimination, whether in the form of complete termination or of a transfer to another employer, prevents the attainment of benefits and saves the employer money. The amount depends totally upon the scope of the discrimination. If saving money

immunized this discriminatory conduct, the violation of § 1140 would contain its own defense. Section 1140 is not soillusory, its plain purpose is to forestall employers from giving in to the otherwise natural inclination to save money through manipulating benefit accrual.

Section 1140 reflects both legislative intent and purpose. It prohibits discrimination against employees to prevent them from attaining rights under a plan. ERISA outlaws such conduct because, absent these prohibitions, the financial rewards of discrimination are too tempting. ERISA does not, however, preclude an employer's consideration of the cost of a pension

plan. ERISA does not require that an employer offer a pension plan at all. Aside from minimal vesting and participation standards, ERISA does notdefine the types of benefits a plan must provide. It does not require that plans be periodically amended to increase benefits or to provide new types of benefits. On each of these points, ERISA permits an employer to consider cost and determine whether a plan or particular benefit program is too expensive. ERISA merely carves out a number of areas in which consideration of costs cannot motivate decisions. Once an employer provides a plan to his employees, ERISA regulates his ability to weigh costs. Section 1140 precludes an employer's

management of pension costs through dismissal of employees or placing employees with other employers before the employee qualifies for promised benefits.

The Employees have never taken the position that an employer can never close a business. The Employees do, however contend that § 1140 requires a neutral decision when decisions such as the ones in the instant case are made. Section 1140 does not immunize employees from the effects of a bona fide business decision undertaken for reasons totally unrelated to the accrual of benefits. The conduct of the employer, however, must not be motivated by discriminatory intent. This is the conduct which is prohibited by § 1140 and thus, one of the reasons why

summary judgment was inappropriate in the instant case. Rarely are questions of intent and motive proper for summary judgment. Sahadi v. Continental Illinois National Bank & Trust Company, 706 F.2d 193, 196-197 (7th Cir. 1983); Ness v. Marshall, 660 F. 2d 517, 519 (3d Cir. 1981).

Both counsel for Amoco and the trial court relied heavily upon the case of Sutton v. Weirton Steel Division of National Steel Corporation, 724 F.2d 406 (4th Cir. 9183), cert. denied, 466 U.S. 1301, (1984). This suit dealt with the propriety of the terms of the sale of a business. The distinguishing factor in this case is that the suit dealt with the terms of a proposed sale. The employees

in _Weirton_ had at all times participated in the proposed sale as noted in the district court opinion, _Sutton v. Weirton Steel Division of National Steel Corporation_, 567 F. Supp. 1184, 1191-92 (N.D.W. Va. 1983). Additionally, all parties had agreed that the announcement by National Steel that it would no longer invest in the Weirton Division which was the subject of the sale, was not a ploy to coerce workers into giving labor costs concessions. One of the acts complained of by the Employees in the instant case is that the proposed sale of the LPG facilities by Amoco to Norgas was concealed from the Employees until such time that the Employees were deprived of a meaningful opportunity to negotiate

with any of the prospective purchasers for benefits or to demand that Amoco fulfill its fiduciary obligations.

Additionally, the opinion of the Fourth Circuit in Weirton is distinguishable from the instant case as § 1140 of ERISA was not even addressed. This opinion focused on the duty of a union with regard to fair representation in thesale of a division of the employer. The terms of the proposed sale of the business differ from the instant case in that the years of service for an employee in Weirton, who had worked for both the predecessor and successor corporations,would have years of service for both aggregated with each employer funding a pro rata share of the benefits.

Neither the district court nor the circuit court in Weirton were faced with the situation in which the plaintiffs alleged the predecessor employer was attempting to increase its profits by deliberately avoiding pension plan liability and in which years of service with the predecessor employer were completely lost.

CONCLUSION

Petitioners, the Employees herein, respectfully request that this Court grant the petition for writ of certiorari to the Circuit Court of Appeals for the

Eleventh Circuit. As grounds therefor, petitioners state that the holding of the Eleventh in the instant case is inconsistent with the Eleventh Circuit with regard to the interpretation of 29 U.S.C. § 1140, that the holding of the Eleventh Circuit was inconsistent with the holding of the Seventh Circuit with regard to the preemption question, and that the holding of the Eleventh Circuit was erroneous with regard to the statute of limitations on the common-law claim for fraud.

J. Gusty Yearout

J. GUSTY YEAROUT

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition has been served upon counsel for all parties in this cause by mailing a copy of same to their office addresses by regular U.S. Mail, postage prepaid and properly addressed this the 26 day of January, 1987, as follows:

Mr. William B. Hairston, Jr.
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I further certify that in accordance with Rule 28.2, this Petition was deposited in a U. S. Post Office box with first-class postage prepaid and properly addressed to the Clerk of the Supreme Court within the time allowed for filing, to-wit: January 26, 1987.

J. Gusty Yearout
J. GUSTY YEAROUT

SWORN TO and SUBSCRIBED before me this 26 day of January, 1987.

Becky G. Davis
NOTARY PUBLIC
My Commission Expires November 17, 1987